NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-04-1011-ZMoS
LOGAN T. JOHNSTON, III,	Bk. No. 01-06221-SSC
Debtor.	Adv. No. 01-00988-SSC
PAULA PARKER,	
Appellant,	
v.	**M E M O R A N D U M**[1]
LOGAN T. JOHNSTON, III, and CELESTE JOHNSTON,	
Appellees.	

Argued and Submitted on February 24, 2005
at Phoenix, Arizona

Filed - April 1, 2005

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Sarah Sharer Curley, Chief Bankruptcy Judge, Presiding.

Before: ZIVE,[2] MONTALI, and SMITH, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Gregg W. Zive, Chief Bankruptcy Judge for the District of Nevada, sitting by designation.

Plaintiff/Creditor/Appellant, Paula Parker ("Parker"), appeals the bankruptcy court's determination that the entire "equalizing judgment" and "supplemental judgment" debt awarded to Parker in the divorce decree between Parker and Defendant/Debtor/Appellee, Logan T. Johnston, III ("Johnston") was dischargeable pursuant to 11 U.S.C. § 523(a)(15)(B).[3] Parker also asks us to determine whether a certain award of attorneys fees should be classified as non-dischargeable pursuant to section 523(a)(5). We hold the bankruptcy court did not abuse its discretion in applying the legal standard under section 523(a)(15)(B) nor did it commit clear error in arriving at its factual findings. Further, even if Parker could avoid the stipulation she entered into, she did not present an adequate record on which we can examine the classification of attorneys fees under section 523(a)(5). Accordingly, we AFFIRM.

I. FACTS

Parker and Johnston were married in 1972. The parties were divorced by operation of a decree of dissolution of marriage entered January 3, 1996 ("Divorce Decree"). The Divorce Decree provided for division of the parties' personal and real property and awarded Parker spousal maintenance, child support and an equalizing judgment in the amount of $366,948.45 (the "Equalizing

[3] Unless otherwise indicated, all references to "chapter" or "section" shall be to the Bankruptcy Code, 11 U.S.C. §§ 101, et seq. and the Federal Rules of Bankruptcy Procedure, Rules 1001, et seq.

Judgment").[4] Parker appealed the Divorce Decree and was awarded a supplemental judgement by the Arizona Court of Appeals in the amount of $59,115.00 ("Supplemental Judgment"). On January 22, 2001, Parker filed a Petition To Show Cause why Johnston should not be held in contempt for failure to pay accrued spousal maintenance provided for in the Divorce Decree. Johnston filed for bankruptcy under Chapter 11 May 14, 2001.

Parker filed an adversary complaint August 27, 2001 against Johnston and his current wife, Celeste Johnston (together with Johnston, the "Johnstons"), seeking a determination, in part, that the debts arising from the Equalizing Judgment and Supplemental Judgment are non-dischargeable pursuant to section 523(a)(15). An amended complaint was filed seeking the same relief. Johnston answered the amended complaint, denying that the judgments are non-dischargeable under section 523(a)(15).

Certain pre-trial motions for dismissal and summary judgment were denied, and the bankruptcy court clarified the issue to be heard at trial at a hearing conducted July 10, 2002. In the Stipulated Pretrial Order entered April 25, 2003, the parties stipulated to the amount of the judgments at issue: the sum of $322,335.35, with accrued interest in the amount of $42,729.31 as of August 19, 2002 is owed on the Equalizing Judgment; the sum of $59,115.00 plus interest accruing at the rate of 10% per annum

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[4] The Amended Complaint filed by Parker in the adversary proceeding also requested a determination of the non-dischargeability of spousal maintenance debt pursuant to § 523(a)(5). The parties stipulated to the payment of $80,093.91 for previously unpaid spousal maintenance in the Stipulated Pretrial Order. Therefore, the non-dischargeability of spousal maintenance is not the subject of this appeal.

since April 7, 1988 is owed on the Supplemental Judgment. The trial occurred May 7, 2003 and was continued to August 4, 2003.

The bankruptcy court issued its written Memorandum Decision September 12, 2003 finding Johnston had met his burden of persuasion under section 523(a)(15)(B) and that the entire debt at issue was dischargeable. The Order Incorporating Memorandum Decision was entered September 18, 2003. Parker timely filed a Motion for Reconsideration which was denied December 18, 2003. On December 29, 2003, Parker filed a Notice of Appeal. The bankruptcy court issued its written Memorandum Decision regarding the Motion for Reconsideration March 11, 2004. The Order Incorporating Memorandum Decision was entered March 12, 2004. Parker filed a Memorandum Regarding Classification of Award of Attorneys Fees to Ms. Parker March 19, 2004, which the bankruptcy court treated as a Second Motion for Reconsideration. The Order Denying Parker's Second Motion For Reconsideration was entered April 27, 2004.

II. ISSUES

A. Whether the bankruptcy court applied the incorrect legal standard under section 523(a)(15).

B. Whether the bankruptcy court erred in determining that the discharge of the debt would result in a benefit to Johnston, but would have no detrimental effect on Parker.

C. Whether the bankruptcy court erred in declining to classify as non-dischargeable an award of $15,000 for attorneys' fees awarded to Parker by the state court.

III. STANDARD OF REVIEW

The Bankruptcy Appellate Panel reviews the "bankruptcy court's findings of fact for clear error and the court's conclusions of law *de novo*." Jodoin v. Samoya (In re Jodoin), 209 B.R. 132, 135 (9th Cir. BAP 1997)(internal citations omitted); Fed. R. Bankr. P. 8013. Mixed questions of law and fact are also reviewed *de novo*. See id.(internal citations omitted). *De novo* review means that the appellate court views the case from the same position as the district court. Lake Mohave Boat Owners Ass'n v. National Park Serv., 138 F.3d 759, 762 (9th Cir. 1998).

The bankruptcy court abuses its discretion if it does not apply the correct law. Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1464 (9th Cir. 1995). An evaluation of the "balance of the equities" test (also known as the "Detriment" test) found in section 523(a)(15)(B) requires the bankruptcy court reach an equitable conclusion. The reviewing court will review the decision for an abuse of discretion. See Graves v. Myrvang (In re Myrvang), 232 F.3d 1116, 1121 (9th Cir. 2000). The reviewing court finds an abuse of discretion when it has a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." Kayes, 51 F.3d at 1464 (internal quotations and citations omitted).

IV. DISCUSSION

A. The bankruptcy court applied the correct legal standard under section 523(a)(15).

A debt incurred by the debtor in the course of a divorce, other than a debt for spousal maintenance or child support, is

non-dischargeable unless:

> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor . . .; or
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor[.]

11 U.S.C. § 523(a)(15). The test set forth in (A) is referred to as the "Ability to Pay" test. See Jodoin, 209 B.R. at 139 n.17. The test set forth in (B) is referred to as the "Detriment" test. Id. at 139 n.18. Once the creditor demonstrates that the debtor incurred the debt in connection with divorce, the burden shifts to the debtor to come forward with evidence to establish the viability of either test. Id. at 141.

Parker has asked us to depart from the plain language of section 523(a)(15) and case law interpreting the same and find that the two prongs of section 523(a)(15) are not actually two different tests, but instead require the following analysis proposed by Parker in her Opening Brief:

> (1) It should first determine whether the Debtor/Defendant had the ability to repay some or all of the debt in question without significantly impairing his own maintenance or support, the maintenance or support of his family or the maintenance of his business. If the Debtor/Defendant does not have the ability to repay any of the subject debt, then the inquiry ends and the debt is dischargeable.
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> (2) If, however, the Debtor does have the ability repay some or all of the subject debt, then the Bankruptcy Court should determine how much of the debt should be equitably discharged and how much should be equitably nondischargeable, and may determine the terms of repayment of the § 523(a)(15) debt.

Appellant's Opening Brief at 9-10. Parker argues that this interpretation is the law as articulated by the Ninth Circuit in Myrvang, 232 F.3d at 1116. The Ninth Circuit held that a

bankruptcy court has the discretion to order a partial discharge of a separate debt arising out of the terms of a divorce decree. Id. at 1124. Moreover, the bankruptcy court in Myrvang ordered the partial discharge because the debtor could not satisfy his burden under the Ability to Pay test of section 523(a)(15)(A). Id. at 1120. The debtor in Myrvang also failed to satisfy his burden under the Detriment test. Id. at 1119. In this case, Johnston failed to satisfy his burden under the Ability to Pay test,[5] however, the bankruptcy court found Johnston did satisfy his burden under the Detriment test.

Myrvang holds that the bankruptcy court may order a partial discharge under the Ability to Pay test (the court did not address a partial discharge under the Detriment test). Nowhere does Myrvang provide that the bankruptcy court must order a partial discharge. Parker's interpretation of section 523(a)(15) and Myrvang asks us to ignore the plain language of the statute. In every case cited by Parker, the bankruptcy court applied both section 523(a)(15) tests, and if the debtor satisfied the burden under either the Ability to Pay test or the Detriment test, the debt was held to be dischargeable, or as in Myrvang, partially

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[5] If the bankruptcy court did make any factual errors, it was with respect to the Johnston's failure to satisfy his burden under the Ability to Pay test. The Memorandum Decision states that by devoting his entire disposable income to Parker, Johnston would be able to repay Parker the Equalizing and Supplemental Judgments in 10 to 15 years from the date of trial. As explained by Johnston, the bankruptcy court's calculation underestimated the time it would take to pay Parker because of the accrued interest. Appellee's Brief at 22. While the court's decision under the Ability to Pay test is not the subject of appeal, it is important to note this error when considering Parker's argument that if Johnston had the ability to pay the entire debt, he should only receive a partial discharge under the Detriment test.

dischargeable. See e.g., Myrvang, 232 F.3d 1116; In re Jodoin, 209 B.R. 132 (9th Cir. BAP 1997); In re Beckford, 257 B.R. 7 (C.D. Cal. 2000); In re Greenwalt, 200 B.R. 909 (W.D. Wash. 1996).[6]

In applying the Detriment test, the bankruptcy court examined the financial condition of both parties and found the Johnstons' economic resources were more limited than Parker. The bankruptcy court listed Parker's significant assets as detailed in her statement of financial condition. The bankruptcy court found that the Johnstons had no stocks, bonds, individual retirement accounts, pensions, savings, life insurance, or health insurance; that the Johnstons owned a home with little or no equity; and that their personal property, exclusive of items valued at less than $500, had been appraised at a value of $23,075. The bankruptcy court also examined the current expenses of the parties, including the $2,000 payment of spousal maintenance Parker receives from Johnston. When balancing the equities among the parties, the bankruptcy court found that the benefit of the discharge would not facilitate a more prosperous lifestyle for the Johnstons and would instead allow Mr. Johnston to proceed with his Chapter 11 reorganization. The bankruptcy court found that Parker was independently wealthy and had no need for the funds at issue. The bankruptcy court concluded that Johnston's discharge and its benefit outweighed the detriment to Parker.

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[6] Parker also cited to an unpublished opinion from the Fourth Circuit Court of Appeals. Ballard v. Ballard (In re Ballard), 69 Fed. Appx. 145 (4th Cir. 2003). Ballard is not binding upon the Panel. The court in Ballard found that "there is no real dispute that both parties have disposable monthly income and will suffer little detriment or receive little benefit if the [subject debt] is paid over time or discharged." Id. at 149. The same cannot be said of the parties in this case.

Parker argues that the decision to discharge the entire debt was not justified by the evidence presented at trial. Parker complains primarily of alleged factual errors as discussed below. Based on the evidence considered by the bankruptcy court, and the lack of factual errors, Parker has failed to demonstrate the bankruptcy court abused in its discretion in determining the entire debt was dischargeable.

Parker fails to provide any compelling argument or legal authority that the bankruptcy court applied the incorrect law, or abused its discretion, including its decision that a partial discharge of the disputed debt was not appropriate.

B. The bankruptcy court did not err in determining that the discharge of the debt would result in a benefit to Johnston, but would have no detrimental effect on Parker.

Parker's argument that the bankruptcy court erred in determining that the discharge of the Equalizing and Supplemental Judgments would have no detrimental effect on Parker consists of a challenge to various factual findings made by the bankruptcy court which are reviewed for clear error. See Jodoin, 209 B.R. at 135. Each alleged factual error will be evaluated below:

1. The Johnstons' Income

Parker argues that the bankruptcy court erred in determining the Johnstons' income. The majority of the findings Parker disputes are not material. Parker complains of findings made with respect to the Johnstons' income and tax returns in 1999-2001. These are largely irrelevant and do not rise to the level of clear error because the bankruptcy court also reviewed the parties' financial information as of the time of trial. Jodoin, 209 B.R.

at 142. Prior to trial, Johnston filed amended Schedules I and J stating current gross income of $13,000 and $3,000 per month, for Johnston and his spouse, respectively. The combined monthly income after taxes stated for Johnston and his spouse was $12,855.34. Parker argues the bankruptcy court should have taken the average of the past 12 months' worth of operating reports to arrive at an income of approximately $17,005.68 per month.[7] While Parker also complains about Johnston's method of preparing the operating reports,[8] she failed to submit the operating reports as part of the appellate record so we do not have an adequate record.[9] It is the appellant's burden to present an adequate record on review. See Kritt v. Kritt (In re Kritt), 190 B.R. 382, 387 (9th Cir. BAP 1995). Unless the record before the appellate court affirmatively shows the matters on which appellant relies for relief, the appellant may not argue those matters on appeal.

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[7] Johnston's calculations omit $69,000 for a personal injury contingency fee. Johnston testified that he does not regularly practice in the area of personal injury and this case was a fluke. Parker has argued that Johnston should start practicing in the area of personal injury law so he can increase his income. Johnston submitted testimony about the challenges of switching fields of practice this late in his career (he was 56 at the time of trial) and the substantial costs to start a plaintiff's personal injury practice. Parker introduced no evidence to the contrary. Parker now complains that Johnston could practice personal injury defense, but did not present any evidence of the possibility at trial.

[8] Johnston was subject to extensive cross-examination about the preparation of the operating reports. It is within the trial court's discretion to assess the credibility of witnesses. See F.R.C.P. 52(a)("due regard shall be given the opportunity of the trial court to judge the credibility of the witnesses").

[9] Johnston listed the income stated from the operating reports in his brief. See Appellee's Opening Brief at 14. Using an average for all operating reports submitted at the time of trial (26 months), instead of the 12-month average, and subtracting the contingency fee because it was an extraordinary event, reflects a monthly average of $13,043 for Johnston.

Everett v. Perez (In re Perez), 30 F.3d 1209, 1217 n.12 (9th Cir. 1994).

The bankruptcy court heard testimony from the parties, reviewed the amended Schedules I and J, and received the operating reports into evidence, in order to arrive at a figure for the Johnstons' monthly income. There is ample evidence in the record to support the bankruptcy court's conclusion with respect to the Johnstons' monthly income. Parker fails to provide any evidence that the bankruptcy court's findings of fact are unsupported. We cannot find that the bankruptcy court committed clear error.

2. The Johnstons' Expenditures

Parker argues the bankruptcy court erred in determining that the Johnstons' expenditures were reasonable under the circumstances. Parker argues that the evidence submitted at trial reveals the Johnstons' live an extravagant lifestyle. Parker complains of the value of the Johnstons' residence, Ms. Johnston's law school tuition, car expenses, cable and DSL service, and the purchase of a $5,000 mattress for Ms. Johnston's back pain. Parker simply lists these expenses and fails to make any argument or introduce any evidence that these expenses are unreasonable or excessive. Because the bankruptcy court received evidence and heard testimony from the Johnstons with respect to each of the expenses, and because Parker failed to introduce any evidence that the expenses were unreasonable or excessive, we cannot find that the bankruptcy court committed clear error.

3. Parker's Financial Situation

Parker argues the bankruptcy court made a number of errors regarding her assets and income. The bankruptcy court's findings

in the Memorandum Decision with respect to Parker's assets and income are consistent with the evidence submitted by Parker at trial.[10] Parker argues that several of her assets are not liquid, but fails to cite any authority or support for her argument that they should have been excluded from the bankruptcy court's consideration. Parker would have liked the bankruptcy court to accept her testimony that her income is declining,[11] but the bankruptcy court eliminated speculation about Parker's future financial condition, including an approximate $2.4 million interest in Illinois real property. See Appellant's Opening Brief at 18; Appellee's Opening Brief at 24. The bankruptcy court's Memorandum Decision cites to Parker's assets and Parker has failed to submit any evidence that even if her income were declining, such a fact would shift the balance of equities in her favor. Accordingly, we cannot find that the bankruptcy court committed clear error.

C. Parker has presented an insufficient record to determine whether the bankruptcy court erred in declining to classify as non-dischargeable an award of $15,000 for attorneys' fees awarded to Parker by the state court.

Parker argues the bankruptcy court erred in not including the $15,000 in attorneys' fees awarded by the Arizona Superior Court in Johnston's section 523(a)(5) obligations. The Minute Entry

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[10] Memorandum Decision (September 12, 2003), at pp. 11-12; Paula Parker Statement of Financial Condition (February 28, 2003).

[11] Parker filed her 2002 tax return with the Supplement To Parker's Motion to Reconsider the Memorandum Decision presumably to demonstrate her income was declining. Assuming Parker's income is declining, the bankruptcy court still had the discretion to consider the total financial picture of the Johnstons and Parker in balancing the equities under § 523(a)(15)(B). See Myrvang, 232 F.3d at 1121.

Order awarding these fees was admitted at trial. The Stipulated Pretrial Order provides the parties stipulated to the amount of the debt subject to classification under section 523(a)(5). The Memorandum Decision entered September 18, 2003 does not discuss the non-dischargeability of the award under section 523(a)(5) because the parties stipulated to the amount and non-dischargeability of such fees in the Stipulated Pretrial Order.

Parker did not raise the issue of the $15,000 award in the Motion to Reconsider Memorandum Decision filed September 29, 2003. Parker did not raise the issue in the Supplement to Parker's Motion to Reconsider Memorandum Decision filed November 3, 2003. Parker first raised the issue at the hearing on the Motion to Reconsider held on December 18, 2003. Parker did not include the transcript of the December 18, 2003 hearing as part of the appellate record.[12] The bankruptcy court entered a Memorandum Decision and Order on March 15, 2004 denying the Motion for Reconsideration. Parker filed a Memorandum Regarding Classification of Award of Attorneys Fees to Ms. Parker on March 19, 2004. It is not clear whether there was a hearing on the Memorandum Regarding Classification of Award of Attorneys Fees; however, if there was, the hearing transcript was not submitted as part of the appellate record. The bankruptcy court denied the Memorandum Regarding Classification of Award of Attorneys Fees in an Order titled Order Denying Ms. Parker's Second Motion for Reconsideration entered April 26, 2004. The Order provides that

[12] Pursuant to 9th Cir. BAP Rule 8006-1, "The excerpts of record shall include the transcripts necessary for adequate review in light of the standard of review to be applied to the issues before the Panel."

the court has placed its "Findings of Fact and Conclusion of Laws" on the record. We have not been provided with a copy of the record to examine these findings and conclusions.[13]

Because the parties stipulated to the amount and non-dischargeability of fees pursuant to section 523(a)(5), and because Parker has failed to provide an adequate record on which to examine the bankruptcy court's findings, we cannot reverse the bankruptcy court's decision declining to classify those fees as non-dischargeable.

V. CONCLUSION

The bankruptcy court did not err in interpreting section 523(a)(15)(B) and its application in this case. Parker has presented an insufficient record to determine whether the bankruptcy court erred in declining to classify as non-dischargeable the $15,000 award of attorneys' fees to Parker. The bankruptcy court's orders of September 18, 2003, December 22, 2003, March 15, 2004, and April 27, 2004 are AFFIRMED.

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[13] The burden of presenting a proper record to the appellate court is on the appellant. Kritt v. Kritt (In re Kritt), 190 B.R. 382, 387 (9th Cir. BAP 1995). Unless the record before the appellate court affirmatively shows the matters on which appellant relies for relief, the appellant may not argue those matters on appeal. Everett v. Perez (In re Perez), 30 F.3d 1209, 1217 n.12 (9th Cir. 1994).